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December 5, 2016

Jeff S. Jordan
Office of General Counsel
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: MUR 7146

Dear Mr. Jordan:

We write as counsel to Correct the Record (CTR) and Elizabeth Cohen in her official capacity as treasurer ("Respondents") in response to the complaint filed by the Campaign Legal Center on October 6, 2016 (the "Complaint"). The Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act").¹

Legal Analysis

"The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."² The Complaint misreads the Act to allege that CTR has made in-kind contributions to Hillary for America (HFA) that violate the Act's source and amount restrictions; however, none of the activities cited in the Complaint qualify as in-kind contributions under the Act.

The Complaint relies on sources that were made public by CTR itself, either in communicating with the press or in FEC disclosure reports. At its inception, CTR publicly announced that it would limit its activities in order to be able to coordinate with HFA.³ Specifically, CTR limited its activities to communications activities that would not qualify as a contribution to HFA that would violate the Act's source and amount restrictions.

Citing news reports and Respondents' own FEC disclosure reports, the Complaint raises the following alleged CTR communications activities:

¹ See 11 C.F.R. § 111.4(d)(3).

² FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

³ See Matca Gold, *How a super PAC plans to coordinate directly with Hillary Clinton's campaign*, The Washington Post (May 12, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/?utm_term=.f738afad796.

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- Producing web videos;⁴
- Publishing websites in support of Secretary Clinton's campaign;⁵
- Tweeting a message about Secretary Clinton that was "identical" to a Clinton campaign staffer's tweet "around the same time;"⁶
- Posting positive comments about Secretary Clinton online "on social media platforms like Twitter, Facebook, Reddit, and Instagram;"⁷
- Commissioning and distributing on its website a poll regarding Secretary Clinton's debate performance;⁸
- Sending "an email to supporters" that included a hyperlink to a Clinton campaign web video;⁹
- Contacting reporters with information supporting Secretary Clinton's campaign¹⁰ or criticizing her primary opponent, Bernie Sanders,¹¹ or her general election opponent, Donald Trump.¹²
- Providing "on-camera media training" to supporters of Hillary Clinton's campaign for President¹³ and connecting those supporters to local media outlets;¹⁴
- Hiring "trackers" to attend and film campaign events for candidates for President;¹⁵ and
- The publishing of an op-ed by CTR President Brad Woodhouse¹⁶ and an op-ed by "Senior Advisor" Jennifer Granholm.¹⁷

⁴ Complaint ¶¶ 5, 21, 30, 35, 43, 49, 53, 61, 64-65, 67.

⁵ *Id.* ¶¶ 19, 46-48, 58, 66.

⁶ *Id.* ¶ 26.

⁷ *Id.* ¶¶ 40-42, 44, 52, 61.

⁸ *Id.* ¶ 31.

⁹ *Id.* ¶ 20.

¹⁰ *Id.* ¶¶ 5, 21, 28-29, 32, 45, 61.

¹¹ *Id.* ¶¶ 22-23, 34, 37.

¹² *Id.* ¶¶ 25, 55-56, 60.

¹³ *Id.* ¶¶ 5, 15.

¹⁴ *Id.* ¶ 51.

¹⁵ *Id.* ¶¶ 16-17.

¹⁶ *Id.* ¶ 57.

¹⁷ *Id.* ¶ 62.

1. Federal campaign finance laws do not prohibit coordination on communications other than “public communications,” and the Complaint fails to allege that CTR coordinated with HFA on public communications.

Federal law treats a coordinated communication as an in-kind contribution to a campaign.¹⁸ Whether a communication qualifies as an in-kind contribution falls under 11 C.F.R. § 109.21.¹⁹

Under 11 C.F.R. § 109.21, a communication is a coordinated communication if it meets three prongs: first, it is paid for by a person other than the candidate, authorized committee, or political party; second, it must satisfy one or more content standards; and third, it must satisfy one of several conduct standards.²⁰ The content prong can be satisfied in one of five ways.²¹ It is satisfied if the communication is an “electioneering communication,” which must be publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.²² The Complaint does not identify any communication that would qualify as an “electioneering communication.”

The remaining four ways to satisfy the content prong require that the communication be a “public communication,”²³ which the Act defines as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising.”²⁴

a. Internet-only communications are not “public communications” and are therefore not in-kind contributions.

Under Commission regulations, “general public political advertising” does “not include communications over the Internet, except for communications placed for a fee on another person’s Web site.”²⁵ In its regulations and several Matters Under Review, the Commission has

¹⁸ See 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 109.20.

¹⁹ See FEC Matter Under Review 5564 (Alaska Democratic Party), Statement of Reasons of Commissioner Lenhard (Dec. 31, 2007); see also FEC Matter Under Review 6722 (House Majority PAC), First General Counsel’s Report (Aug. 6, 2013) (finding that Internet communications other than those placed for a fee on another person’s website, which are not public communications, are governed by 11 C.F.R. § 109.21 and therefore cannot be contributions); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel’s Report (May 16, 2013) (production costs associated with online videos fall under § 109.21 and are not contributions).

²⁰ See 11 C.F.R. § 109.21.

²¹ FEC Matter Under Review 6722 (House Majority PAC), General Counsel’s Report at 4 (Aug. 6, 2013) (citing 11 C.F.R. § 109.21(c)(1)-(5)).

²² See *id.* (citing 11 C.F.R. §§ 109.21(c)(1), 100.29(a), (b)(1)).

²³ *Id.* (citing 11 C.F.R. § 109.21(c)(2)-(5)).

²⁴ 52 U.S.C. § 30101(22).

²⁵ 11 C.F.R. § 100.26.

consistently held that online content—including costs associated with researching and producing that content—is not a “public communication” unless a fee is paid to post it on another’s website.²⁶ That also applies to distributing materials to reporters over the Internet.

The Complaint argues that costs associated with producing the research and materials that CTR distributed on free online platforms should be treated as in-kind contributions to HFA, but that is not how the Commission has interpreted its regulations. The FEC has “narrowly interpreted the term Internet communication ‘placed for a fee,’ and has not construed that phrase to cover payments for services necessary to make an Internet communication.”²⁷ The Commission has not considered an online communication to be an in-kind contribution even when it included a slickly produced video,²⁸ was sent over a rented email list,²⁹ or was built by paid staff.³⁰ The Complaint therefore misreads the law when it argues that CTR made in-kind contributions by researching and producing web videos, websites, and social media posts, by publishing a poll on its website, by emailing supporters with a link to an online Clinton campaign video, and by emailing reporters, because all of these Internet activities do not involve paying a fee to post something on another’s website and therefore fail to qualify as “public communications.”

- b. Contacts to reporters are not public communications and are therefore not in-kind contributions. Additionally, such contacts fall under the “media exemption” from a definition of a contribution.**

Among the types of public communications enumerated in 11 C.F.R. § 100.26, only three—Internet communications, telephone banks, and mass mailings—are not *per se* public

²⁶ See, e.g., Federal Election Commission, Internet Communications, 71 Fed. Reg. 18589, 18595 (May 12, 2006)(explanation and justification) (“[P]osting a video on a Web site does not result in a ‘public communication’ unless it is placed on another person’s Web site for a fee,” even if costs were incurred to film the video); FEC Matter Under Review 6722 (House Majority PAC), General Counsel’s Report (Aug. 6, 2013)(video placed on YouTube for no fee is not a public communication); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress, *et al.*) General Counsel’s Report at 7 (Feb. 5, 2013) (YouTube and Facebook postings and a website fail the content prong of the coordinated communications test because they are not placed for a fee on another’s Web site and are therefore not public communications); FEC Matter Under Review 6477 (Turn Right USA), General Counsel’s Report at 8 (Dec. 27, 2011) (video posted on a website for which respondent paid no fee did not satisfy the content prong of the coordinated communication test); FEC Matter Under Review 6657 (Akin for Senate), General Counsel’s Report at 6-7 (May 16, 2013) (“The Commission has narrowly interpreted the term Internet communication ‘placed for a fee,’ and has not construed that phrase to cover payments for services necessary to make an Internet communication,” including renting an email list); FEC Matter Under Review 6414 (Carnahan in Congress Committee *et al.*), General Counsel’s Report at 12 (Apr. 11, 2012) (a website is not a public communication even though researchers were paid to help build it).

²⁷ FEC Matter Under Review 6657 (Akin for Senate), First General Counsel’s Report (Sept. 17, 2013) at 6-7.

²⁸ FEC Matter Under Review 6722 (House Majority PAC), General Counsel’s Report (Aug. 6, 2013).

²⁹ FEC Matter Under Review 6657 (Akin for Senate), General Counsel’s Report at 6-7 (May 16, 2013).

³⁰ FEC Matter Under Review 6414 (Carnahan in Congress Committee *et al.*), General Counsel’s Report at 12 (Apr. 11, 2012).

communications. Internet communications are not public communications unless they are placed for a fee on another person's website. Similarly, a series of telephone calls or mailings only qualifies as a "public communication" if it exceeds 500 calls or letters.³¹ Therefore, a series with 500 or fewer calls or mailings is, by definition, *not* a "public communication" and cannot be a contribution. The Complaint does not allege specific facts that would give the Commission reason to believe that CTR's alleged contacts with reporters to pitch stories or place surrogates exceeded 500 substantially similar telephone calls or letters. Therefore, the Commission does not have reason to believe that these contacts with reporters qualify as a "public communication."

Communicating with reporters also falls under the "media exemption." Under 11 C.F.R. § 100.73, "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate." When reporters discuss stories with sources, that is a cost incurred in covering a news story, and it is therefore not a contribution. CTR's contacts with reporters therefore fall under the media exemption and are not a contribution to HFA.

The Complaint also takes issue with a set of media training sessions that CTR held for grassroots supporters of Hillary Clinton.³² Those communications with local volunteers are not a contribution to HFA. CTR did not include any official Clinton campaign surrogates (as identified by HFA) or HFA staff in the trainings. CTR did not solicit or accept any suggestions from HFA regarding which individuals should attend the sessions or otherwise permit HFA to direct individuals to the sessions. The sessions were a free service to local volunteers who wanted to support Secretary Clinton's campaign. The Complaint fails to allege any specific facts that would give the Commission reason to believe that these communications to supporters would qualify as a "public communication" under 11 C.F.R. § 109.21 and would therefore qualify as an in-kind contribution to HFA.

2. HFA paid CTR hundreds of thousands of dollars for research and tracking materials, and the Complaint fails to allege specific facts that would give the Commission reason to believe that CTR sold research and tracking materials to HFA at less-than-fair-market value (which would have been an in-kind contribution).

The Complaint takes issue with CTR providing tracking and research to HFA, but concedes that HFA reimbursed CTR for these services.³³ As reported in CTR's FEC reports, on June 1, 2015,

³¹ 11 C.F.R. §§ 100.26–100.28.

³² Complaint at ¶¶ 5, 15.

³³ See Complaint ¶¶ 18, 33.

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HFA paid CTR \$275,615.43 for research.³⁴ On July 17, 2015, HFA paid CTR \$6,346 for "research services."³⁵ When a campaign or party committee pays fair market value for something, no contribution results.³⁶ That applies even if the services for which the campaign pays fair market value might have only one potential seller and one potential buyer; in 2010, the FEC found no reason to believe that Martha Coakley's federal campaign received an improper in-kind contribution when it purchased a fundraising database, a redesign of the candidate's website, domain names, and \$6,000 worth of yard signs, posters, buttons, lanyards and t-shirts featuring her campaign logo from her state committee on the day she announced her Senate candidacy. The FEC dismissed the complaint on the basis that "there is no information to suggest that the amount paid by the federal committee for the assets was not fair market value."³⁷ Here, the Complaint fails to allege specific facts that would give the Commission reason to believe that HFA did not pay fair market value for the tracking and research it received from CTR. "Unwarranted legal conclusions from asserted facts" or "mere speculation" are not sufficient to support finding reason to believe that Respondents violated the Act.³⁸

3. Op-eds fall squarely within the media exemption from the definition of a contribution.

The media exemption at 11 C.F.R. § 100.73 exempts from the definition of "contribution" "any cost incurred in covering or carrying a news story, **commentary, or editorial**" (emphasis added). Thus, the costs incurred by CTR President Brad Woodhouse and "Senior Advisor" Jennifer Granholm in writing op-eds in support of Secretary Clinton are not contributions because they fall under the "media exemption."

Because the Complaint fails to allege specific facts that would give the Commission reason to believe that CTR made and HFA accepted any in-kind contributions, there is no reason to believe that Respondents violated source and amount restrictions on contributions or failed to meet reporting obligations under the Act.

Conclusion

³⁴ Correct the Record, FEC Form 3X, Schedule A, line 17 at 8 (July 31, 2015), <http://docquery.fec.gov/pdf/419/201507319000556419/201507319000556419.pdf#navpanes=0>.

³⁵ Correct the Record, FEC Form 3X, Schedule A, line 17 at 17 (Dec. 31, 2015), <http://docquery.fec.gov/pdf/110/201601319004983110/201601319004983110.pdf#navpanes=0>.

³⁶ See, e.g. FEC Adv. Op. 2002-14 (candidate's purchase of advertising space from party committee only results in contribution to candidate if payment is less than the usual and normal charge); FEC Adv. Op. 2010-30 (section 501(c)(4) corporation's rental of email list to federal candidates and political committees at usual and normal charge does not result in an expenditure by corporation).

³⁷ Matter Under Review 6216 (Coakley for Senate) Statement of Reasons at 6 (Sept. 8, 2010).

³⁸ FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

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For the foregoing reasons, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,



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Counsel to Respondents

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